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Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, *et al.*

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, *et al.*

On Writ Of Certiorari And Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE UNITED NEGRO COLLEGE FUND AND KAPPA ALPHA PSI AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

SYDNEY M. AVENT
General Counsel

WILLIAM A. BLAKEY
DEAN BLAKEY
Washington Counsel

UNITED NEGRO COLLEGE FUND
8260 Willow Oaks Corporate Drive
Fairfax, Virginia 22031

DREW S. DAYS, III
Counsel of Record

JONATHAN BAND
BETH S. BRINKMANN
SETH M. GALANTER
CHARLES C. CARSON
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1500

Attorneys for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amicus United Negro College Fund (UNCF) was founded in 1944 to increase educational opportunities for African Americans. A UNCF member institution must be a historically black, private, accredited, four-year college or university in the United States, founded prior to 1945 and operated solely for educational or scientific purposes. The 39 UNCF members are located in ten southern States, Ohio, and Texas. *See*, App., *infra*, 1a-2a (listing all UNCF member colleges and universities). Since its founding, UNCF has raised nearly $2 billion to support its member colleges and universities and has assisted more than 300,000 students earn undergraduate and graduate degrees. It is the Nation's oldest and most successful African American education association.

UNCF's founding purpose was to raise general operating funds for its member colleges and universities in order to lower tuition costs. It provides unrestricted operational support to its members. Tuition and fees at UNCF member colleges and universities are half as much, on average, as other private American colleges even though their endowments are equal to one-third.

UNCF's mission also includes administering financial assistance that is awarded to deserving students. UNCF administers Ph.D. fellowships, which increase the number of African Americans with doctoral degrees, and a Corporate Scholars Program, which is a combination of scholarship, work experience and mentoring within corporate America. UNCF has partnered with particular corporations such as Pfizer, Inc., and the Merck Company Foundation to offer scholarship awards to minority students to

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[1] Letters from the parties consenting to the filing of this brief have been filed pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

expand the pool of African American biomedical scientists to achieve the complementary goals of national economic competitiveness and social diversity.

In 1999, UNCF became an administrator of the Gates Millennium Scholars Program. The program is aimed at increasing the number of African Americans, Hispanics, Native Americans, and Asian Americans with academic promise, significant unmet financial need, and demonstrated leadership who enroll in and complete undergraduate and graduate degree programs. Its stated goal is to enable 20,000 such students over the next 20 years to attend the colleges, universities, and professional schools of their choice.

Throughout its history, UNCF has enjoyed widespread support by Americans of all races and backgrounds. Significantly, it has been honored by a tradition of support from Presidents of the United States, beginning with President Franklin D. Roosevelt who supported the first annual fundraising campaign. President John F. Kennedy donated to UNCF the Pulitzer Prize funds awarded for his book, *Profiles in Courage*, and supported the second capital campaign in 1963 that raised $33 million. President George H.W. Bush hosted the reception to help UNCF launch its most ambitious capital campaign in 1990 that ultimately raised $280 million over the subsequent six years.

UNCF joined in an *amicus curiae* brief that was filed in one of the instant cases in the United States Court of Appeals for the Sixth Circuit urging that court to sustain the constitutionality of respondents' consideration of race in making admissions decisions. Given the historical mission of UNCF and its role over the past half-century in promoting access to higher education for African American students, UNCF has a strong interest in the proper resolution of the questions presented in these cases.

Amicus Kappa Alpha Psi Fraternity is an organization of primarily African American men who are graduates and undergraduates of colleges and universities throughout the nation. Founded in 1911, it has more than 100,000

members and 500 chapters. Long active in unlocking the doors of educational opportunities for young African American men who frequently encounter discrimination in their quest to obtain a college education, Kappa Alpha Psi Fraternity also has a strong interest in the outcome of these cases.

SUMMARY OF ARGUMENT

The importance of allowing traditionally white colleges, universities, and professional schools to consider race when identifying qualified students for admission cannot be understood fully without taking into account the history of the American educational system. The racial exclusion, segregation, and discrimination that, for centuries, permeated all aspects of the Nation's educational system, along with the current underfunding of primary and secondary schools in lower income minority communities, are significant to understanding the compelling nature of the governmental interest in admitting a diverse student body and the benefits to both individuals and society of ensuring educational opportunity for all, so that no child is left behind.

A. For the Nation's first one hundred years, more than four million African Americans were enslaved and kept illiterate by law. Over the course of the next century, most African Americans were relegated to racially segregated public schools for primary and secondary education, and those schools were not provided the same financial or other resources as their white counterparts. Opportunities for African Americans in higher education were generally limited to private historically black colleges and universities that were lacking in financial resources, or public land-grant institutions that were racially segregated by law as well as underfunded. *Amicus* United Negro College Fund was founded in 1944 by 27 of the private historically black colleges and universities to raise general operating funds and scholarship assistance for its members. Although most of UNCF's awards to individuals are not based on race and are awarded to students at a wide

variety of schools across the nation, its focus on financial aid directly addresses a particular need of African American college students who were, and continue to be, disproportionately from lower income families.

This Court's ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954), led to a remarkable transformation in the American educational system. Notwithstanding that extraordinary progress, however, large numbers of African American school children, especially in large urban and smaller rural school settings, are locked in poorly-funded, inferior schools.

In light of this national history, both past and present, one cannot dispute that race is a unique factor in American education, and this Court has repeatedly recognized that education is a particularly important means of overcoming the effects of past racial discrimination. Therefore, *amici* believe that promoting racial diversity in higher education is a compelling governmental interest. Having racially diverse student bodies at the Nation's most prominent colleges, universities, and professional schools is important because it ensures that the unique benefits and opportunities gained through attendance at such schools extend to African Americans who were traditionally excluded, allows the development of a diverse pool of institutions that aim to serve the needs of an increasingly diverse Nation, and promotes the Nation's general welfare by increasing the economic resources of African Americans in society.

B. Historically black colleges and universities have played, and continue to play, an important role in American higher education, but the dramatic increase in African American access to higher education was not achieved through efforts like UNCF's alone. That increase could not have been achieved without efforts since the 1960s by traditionally white institutions to foster racial diversity on their campuses, including through race-conscious policies.

Amici believe that such efforts continue to be a necessary component of any successful strategy to maintain a significant enrollment of African Americans in higher

education, especially because the effects of past racial discrimination still are felt by many African Americans today. Those effects include attending substandard primary and secondary schools and having families whose members have not had an opportunity to attend college themselves. Such factors contribute to a child, regardless of ability, being less likely to perform well on traditional quantitative measurements of academic promise. Significantly, however, a determination that there is a lack of preparedness under traditional evaluation criteria does not mean that African Americans who are identified through other means are not qualified and do not thrive at colleges and universities once admitted. To the contrary, the success rate of African Americans at traditionally white institutions does not differ from their peers. The use by traditionally white institutions of additional admission criteria has helped to identify qualified African Americans who perform well in college, graduate school, and the "real world."

C. If traditionally white institutions of higher education are not allowed the flexibility to look beyond narrow quantitative measures of college readiness and consider race, much of the progress of African Americans in higher education will be lost. The many race-neutral alternatives that have been suggested have not proven effective and all suffer from serious limitations. The "percentage plans" adopted in states like Texas, which achieve racial diversity only because they are premised on *de facto* racial segregation in high school, are not an option for private colleges or universities, or for graduate and professional schools, whether public or private, that draw from a national and international applicant pool.

Allowing the use of race-conscious policies in the awarding of financial aid is also critical to ensuring African Americans continued access to higher education. After all, the admission of qualified African Americans even under the most rigid, traditional quantitative standards means nothing if such students cannot afford to attend.

Institutions of higher education also must be allowed to make race-conscious admissions decisions in order to ensure the presence of qualified African Americans in critical professions and positions of leadership in American society. Statistical analyses predict that colleges and universities would suffer drastic decreases in African American enrollment if race were not considered, with enrollment at the most selective schools falling more than 70 percent. Based on the studies of what would have happened if institutions of higher education had not, in the past, looked beyond "the numbers," there would be 40 percent fewer minority doctors today. No doubt similar reductions would have occurred in other professions. That waste of human potential would be detrimental not only to individual African American students, but to the Nation as a whole.

ARGUMENT

THE HISTORY OF RACIAL DISCRIMINATION IN AMERICAN EDUCATION DEMONSTRATES THAT CONTINUED EFFORTS TO ENHANCE MINORITY ACCESS TO HIGHER EDUCATION MUST EMBRACE RACE-CONSCIOUS ADMISSIONS TO FURTHER A COMPELLING GOVERNMENTAL INTEREST

The compelling nature of the governmental interest in fostering racial diversity in student bodies at traditionally white colleges, universities, and professional schools cannot be understood fully without consideration of the history of racial exclusion, segregation, and discrimination that, for centuries, permeated all aspects of the Nation's educational system, as well as the current underfunding of the primary and secondary schools that prepare many minority students who seek admission to college.

A. The Exclusion Of African Americans From The Nation's Traditionally White Educational Institutions Resulted In A Long History Of Disproportionate Numbers Of African Americans Attending Under-Resourced Schools

1. Historically black colleges and universities were created to educate emancipated slaves because they were excluded by law and practice from white schools on account of their race

a. The vast majority of African Americans were barred by law from educational institutions throughout the United States for the first one hundred years of the Nation's existence. Indeed, at the time of the Civil War, 92 percent of the entire population of African Americans in this country were enslaved, without the legal right to earn a living of their own, and generally without the most fundamental of human rights to marry or raise their own families, let alone to obtain any type of education. John Hope Franklin & Alfred A. Moss, Jr., *From Slavery to Freedom: A History of African Americans* 138-166 (8th ed. 2000); Henry N. Drewry & Humphrey Doermann, *Stand and Prosper: Private Black Colleges and Their Students* 13-15, 25 (2001).

Following emancipation in 1863 and the end of the Civil War in 1865, a major effort was made to provide the more than 4 million former slaves with educational opportunity. Initially, that effort was led by a loose coalition of religious missionary groups and private northern freedmen's aid societies. Further support was provided by the federal Freedmen's Bureau, a branch of the War Department. Their combined efforts nearly quadrupled the number of schools for African Americans in the United States in the first four years following the Civil War. *Stand and Prosper*, *supra*, at 39-40; *see also From Slavery to Freedom*, *supra*, at 256-257; Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* 144-148 (1988).

Most of the historically black private colleges and universities that are members of *amicus* United Negro College Fund (UNCF) were established during the first decade or two following the end of the Civil War in the South, where more than 90 percent of African Americans then lived. *Stand and Prosper, supra,* at 23. These educational institutions were created as a direct response to the profound need of the African American population, nearly 90 percent of whom were illiterate because of laws that had made it a crime to teach African Americans, enslaved or free, to read or write. *Id.* at 34; 2 James Kent, *Commentaries on American Law* 253 n.a (4th ed. 1840) (citing laws of Georgia, Virginia, Alabama, and Louisiana prohibiting teaching slaves or "free negroes" to read or write). Even in the "free" States, there had been almost no opportunities for African Americans to obtain the most minimal education. Less than 2 percent of school-aged African Americans in 1860 were enrolled in school. *Stand and Prosper, supra,* at 25 tbl. 2.3. It was only in the rarest of circumstances that an African American was able to attend a college or university. By 1865, only 28 individuals among the 4.4 million African Americans living in this country had received college degrees. Julian B. Roebuck & Komanduri S. Murty, *Historically Black Colleges and Universities: Their Place in American Higher Education* 22 (1993).

Although many of the private black institutions established in the years following the Civil War were founded as colleges and universities to educate adults, their initial focus had to be on primary and secondary education because nearly all African American adults and adolescents, as well as children, had no formal education. Therefore, the early historically black colleges and universities were all dedicated to preparing former slaves for collegiate studies in order to create their own high school graduates who would be capable of succeeding in college-level work. Later, in the 1870s, a true public primary school system and, to a lesser extent, a secondary school system for African Americans began to take shape in the South. Those systems were almost entirely segregated and remained so

for nearly a century. *Reconstruction, supra,* at 365-368; *From Slavery to Freedom, supra,* at 445-455.

Meanwhile, in 1890, in response to newly enacted federal legislation permitting States to use federal land-grant funds for the "establishment and maintenance of such colleges separately for white and colored students," Second Morrill Act, ch. 841, 26 Stat. 417, 418 (1890), many southern States began establishing segregated public land-grant colleges for African Americans. The curriculum in the black land-grant colleges focused almost exclusively on teacher training and industrial education. And despite federal requirements to the contrary, "black public colleges suffered substantial, consistent, and nearly universal discrimination in funding" as well as "restricted programs of instruction and narrowly defined institutional missions" in comparison to their white counterparts. Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 Minn. L. Rev. 29, 45, 64 (1987). That differential resource allocation between white and black land grant institutions persists. William E. Trueheart, *The Consequences of Federal and State Resource Allocation and Development Policies for Traditionally Black Land-Grant Institutions: 1862-1954*, 58-61, 116-118, 165-169 (1979); President's Board of Advisors on Historically Black Colleges and Universities, *2001-2002 Annual Report* 20 & app. D (Sept. 2002).

Although the public land-grant institutions were racially segregated, the newly founded private colleges and universities were not. The historically black colleges and universities were once the only educational institutions in the country admitting all races and thus were among the few common meeting grounds for African Americans and whites. Indeed, some admitted white students despite state law prohibitions against doing so. *See, e.g., Berea College v. Kentucky*, 211 U.S. 45 (1908) (upholding criminal conviction of private college that violated state law prohibiting the operation of "any college, school, or institution where persons of the white and negro

races are both received as pupils for instruction"). In 1887, Atlanta University (one of the predecessor institutions to Clark Atlanta University) lost its state funding when it refused to stop enrolling white students. *Stand and Prosper, supra,* at 53.

b. Southern States also refused to provide sufficient resources to the segregated black primary and secondary public schools. As late as 1934, only 39 public secondary schools for African Americans in the South were accredited, including only two in Alabama, one in South Carolina, and none in Mississippi, which had the largest percentage of African American citizens of any State. *Stand and Prosper, supra,* at 72. In the 1940s, per-pupil spending on education in the South for African American children averaged about one-third of that for white students and the school year was one to three months shorter. Susan T. Hill, *The Traditionally Black Institutions of Higher Education 1860-1982* 11 (1985); *see generally* Southern Education Foundation, *Redeeming The American Promise: Report of the Panel on Educational Opportunity and Postsecondary Desegregation* (1995). African American children were taught in classes that contained, on average, 25 percent more students, but African American teachers were paid almost half the salary of white teachers. David Card & Alan B. Krueger, *School Quality and Black-White Relative Earnings: A Direct Assessment*, 107 Q. J. of Econ. 151, 167 (1992).

The States' failure to provide adequate resources to black primary and secondary schools meant that many African Americans were not prepared for college-level studies. By 1940, the median amount of education received by African Americans in the country aged 25-29 was 6.5 years. Gerald D. Jaynes & Robin M. Williams, Jr., eds., *A Common Destiny: Blacks and American Society* 334 (1989). Therefore, although the increased number of primary and secondary schools for African Americans by the early part of the 20th Century allowed private black colleges and universities to begin to focus exclusively on higher education, the African American student population did not increase in a corresponding manner. The number of college

degrees awarded by historically black colleges and universities more than doubled from the 1920s to the 1930s,[2] but still less than 2 percent of African Americans had received a college degree by 1940, compared with 7.5 percent of white men and 5 percent of white women. *Id.* at 339. In 1950, only 5 percent of college-aged African American men and 4 percent of African American women were enrolled in college, whereas 15 percent of white men and 8 percent of white women were enrolled as undergraduates. *Stand and Prosper, supra,* at 76.

2. UNCF was founded in 1944 to provide financial support to historically black colleges and universities

a. Because of the continuing state-sanctioned racial segregation in education, virtually all African American college students in the years prior to *Brown v. Board of Education*, 347 U.S. 483 (1954), attended historically black colleges and universities. *Historically Black Colleges, supra,* at 43. By the time of the Second World War, those institutions suffered from a lack of financial resources that led to the formation of UNCF in 1944.

UNCF's founding purpose was to raise general operating funds and scholarship assistance for its member colleges and universities to lower tuition costs. Twenty-seven private black colleges and universities answered the call of the President of Tuskegee Institute, Dr. Frederick D. Patterson, to "pool their small moneys and make a united appeal to the national conscience" through formation of UNCF. UNCF provided those colleges and universities with a stronger combined voice that could ensure that their appeal to conscience was heard by all Americans,

[2] In 1926-27, private black colleges awarded 818 college degrees, while public black colleges awarded 165. The number of college degrees awarded in 1935-36 were 1,970 and 1,490, respectively. *Stand and Prosper, supra,* at 73 tbl. 6.2.

both black and white, including prominent national leaders. *See* page 2, *supra*. UNCF's first annual campaign demonstrated the wisdom of the combined approach by raising three times the amount of funds that its members had been able to raise independently the prior year.

b. Although UNCF's focus on raising general operating funds and scholarship assistance for its members continues to be one of its primary functions, UNCF's mission also has evolved over the years to include capital campaigns, solicitation of special project grants, and contributions to endowments. UNCF further broadened its mission to include a public awareness campaign, originally launched in 1972, under the slogan – "A mind is a terrible thing to waste" – which served as a dramatic reminder to the Nation of the vital importance of education both to individuals and to society as a whole.

UNCF expanded its financial support for higher education by increasing its administration of scholarships and fellowships to individual students. Although most of those awards are not based on race, the focus on financial aid at historically black colleges and universities and elsewhere directly responded to a particular need of African Americans. In 1940, 90 percent of African Americans still lived in poverty, earning less than half of the average white person, due in no small part to the absence of equal educational opportunity. William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 1 (1998). Even today, an African American is twice as likely to live in poverty than a white American. U.S. Census Bureau, *Statistical Abstract of the United States* 442 (2002). In 1995, approximately 70 percent of the families of the African American students enrolled in four-year colleges had incomes below the national median. *Stand and Prosper*, *supra*, at 202 tbl. 11.6. In four-year colleges as a whole, a larger percentage of African Americans need financial aid than any other group. Most UNCF college students come from economically disadvantaged families – 59 percent have family incomes below $25,000. Frederick D. Patterson Research Institute/UNCF, *UNCF*

2001 Statistical Report 19 fig. 12 (2001). Approximately 90 percent of UNCF students require financial assistance to enroll in college, and 60 percent are the first in their families to attend college.

UNCF scholarships enable thousands of students to attend not only UNCF member colleges and universities, but also other historically black, as well as traditionally white, colleges and universities across the country. Approximately 60,000 UNCF students attend its 39 member colleges and universities and another 5,000 attend over 950 schools across the Nation. Currently, UNCF administers more than 450 programs, including scholarship programs, mentoring, summer enrichment, curriculum and faculty development, and leadership development. More important, the presence of these programs and UNCF's role in administering them reflect an increased awareness in America's donor community of the need to address the disparity in college participation between majority and minority students. William B. Harvey, American Council on Education, *Minorities in Higher Education 2001-2002: Nineteenth Annual Status Report* 1-2, 15-19, 21-23 (2002).

3. Disproportionate numbers of minority students continue to receive inferior primary and secondary schooling

a. Despite the formation of UNCF and other educational opportunities that became available following World War II, African Americans continued to have dramatically reduced opportunities to obtain a quality education. Finally, in 1954, this Court declared in *Brown* that racial segregation and discrimination in education could not be defended against constitutional challenge as "separate but equal," because segregated schools were inherently unequal. Because of delay, official recalcitrance, and local hostility, however, transforming that decree into reality at the primary and secondary level proved difficult. *See*, *e.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958); *Alexander v. Holmes*, 396 U.S. 19 (1969). That was even true at the level of

higher education, *see, e.g.*, *Meredith v. Fair*, 305 F.2d 343 (5th Cir.), *stay denied*, 83 S. Ct. 10, 11 (1962); *United States v. Fordice*, 505 U.S. 717 (1992), despite this Court having made clear from the start that any logistical problems that allowed a transition period at the primary and secondary education level did not apply to graduate schools, so that admission of African Americans to traditionally white institutions of higher education was mandated immediately, *see Lucy v. Adams*, 350 U.S. 1 (1955) (per curiam); *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956) (per curiam).

Ultimately, in the less than 50 years since *Brown*, the educational system in America did undergo a remarkable transformation, with the African American children who attended the substandard segregated schools of the 1950s growing up to see many of their children not only attend integrated primary and secondary schools, but also have the opportunity to attend colleges and universities. For example, in 1992-1993, nearly 45 percent of African Americans who received college degrees were first-generation college students. 1 Michael T. Nettles & Laura W. Perna, *The African American Education Data Book* 265 tbl. 5 (1997); *see also* Walter R. Allen & Joseph O. Jewell, *The Miseducation of Black America: Black Education Since "An America Dilemma," in An American Dilemma Revisited: Race Relations in a Changing World* 169, 172-180 (Obie Clayton, Jr. ed., 1996) (providing an empirical assessment of educational progress of African Americans since World War II).

b. Notwithstanding the extraordinary progress made to date, very large numbers of minority school children, especially African American and Latino youngsters in large urban and smaller rural school settings, are locked in poorly-funded, inferior schools. Laura Lippman *et al.*, U.S. Department of Education, *Urban Schools: The Challenge of Location and Poverty* v-xii, 75-80 (1996). The twin barriers of race and poverty frequently prevent the laying of a proper educational foundation in the home, and often result in less well-funded or low-performing schools

operating in minority neighborhoods and cities. *Urban Schools, supra*, at 1-45.

Congress's recent enactment of the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002), with the strong support of President George W. Bush, is a tacit acknowledgement that some schools are failing minority and other low-income children who are targeted by Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 6301 *et seq.* as amended. Unfortunately, the schools with the most limited resources, the least experienced and poorest paid teachers, and the parents least able to advocate effectively for their children, are attended by minority and low-income families. It is a simple fact that a low-income, less well-prepared student has the least chance of gaining access to college. Children's Defense Fund, *Progress and Peril: Black Children In America* 27-28, 79-98 (1993) (documenting poverty levels and educational attainment among African American children).

In addition, it cannot be said that institutions of higher education are free from racism and discrimination in the 21st Century. In Joe R. Feagin's *The Continuing Significance of Racism: U.S. Colleges and Universities* (2002), the American Council on Education reveals a reality that many in higher education would deny, except when racially charged incidents catch the attention of the national media and call the country's attention to our sobering shortcomings. *Id.* at 9-24. And there can be little doubt that race still plays an important, sometimes overriding, role in the everyday life, work, and school experiences of African Americans, such that African Americans consistently cope with the subtleties, nuances and omnipresence of race in America. This is true despite denials by those whose skin color means that they do not have to face that reality. The persistence of race as a factor, along with income, in determining available resources, quality of instruction, and the freedom and capacity of a family to support the educational aspirations of their children, ultimately determines both the academic preparation and rate of matriculation of minority students

with respect to college. Jacqueline E. King, American Council on Education, *Money Matters: The Impact of Race/Ethnicity and Gender on How Students Pay for College* 5-16 (1999).

c. In light of this national history, both past and present, one cannot dispute that race is a unique factor in American education. And this Court has repeatedly recognized that education is a particularly important means of overcoming past racial discrimination. Educational opportunity provides not only the means for individual success, *see Brown*, 347 U.S. at 493, but also a way to lessen the underlying prejudices that burden historically disfavored groups. *See Plyler v. Doe*, 457 U.S. 202, 222 (1982) ("by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority"). The education of African Americans and other minorities also is important to the Nation's general welfare. It is well documented that, over a lifetime, a college graduate will earn nearly double the income of a high school graduate. Even accounting for the racial disparities in income earned by degree attainment, minorities substantially increase their income potential by completing college. One cannot underestimate the economic and educational value added to America when she educates her minority citizens. Kenneth E. Redd, *HBCU Graduates: Employment, Earnings and Success After College*, USA Group Foundation New Agenda Series, Aug. 2000, at 1, 10-17.

Because the generation of change since *Brown* is still burdened with the remnants and the continued effects of the prior two centuries' racial exclusion, segregation, and discrimination, there is a continued need for attention to be given to matters of race in the colleges, universities, and professional schools of America. In particular, *amici* believe that promoting racial diversity in higher education is a compelling governmental interest. Having racially diverse student bodies at the Nation's most prominent colleges, universities, and professional schools is particularly compelling because it ensures that the unique benefits and

opportunities gained through attendance at such schools extend beyond the all-white population that most of those institutions were founded to serve. *Cf. United States v. Virginia*, 518 U.S. 515, 552-554 (1996) (describing tangible and intangible benefits of educational institutions that cannot easily be replicated). Moreover, affording flexibility to colleges, universities, and professional schools in admissions decisions allows the development of a diverse pool of institutions that aim to serve the needs of an increasingly diverse Nation.

B. The Dramatic Increase In African American Access To Higher Education Over The Past Several Decades Was Not Achieved Through Efforts Like UNCF's Alone, But Was Also The Result Of Efforts By Traditionally White Institutions To Foster Racial Diversity

1. Historically black colleges and universities continue to play an important role in higher education, but African Americans should have access to the full spectrum of colleges, universities, and professional schools

The increase in African American participation in education at all levels over the past several decades has been dramatic. In 1940, only 8 percent of African Americans over the age of 25 had completed four or more years of high school. Frederick D. Patterson Research Institute/UNCF, *The Torch: A Research Bulletin Shedding Light on Critical Issues in African American Education*, Dec. 2001, at 5. By 2000, nearly 80 percent had done so. *Ibid.* In that same time period, the number of African Americans over 25 years of age who had completed four or more years of college increased more than 2,600 percent. *Ibid.*

The efforts of UNCF, its member colleges and universities, and other historically black colleges and universities have played, and continue to play, an important role in that progress. Historically black colleges and universities

constitute just 4 percent of the 2,400 baccalaureate degree granting institutions in America, yet these institutions produce 24 percent of all African Americans with four year degrees. *Responding to the Needs of Historically Black Colleges and Universities in the 21st Century: Jt. Hearing Before the Subcomms. on 21st Century Competitiveness & Select Educ. of the House Comm. on Educ. & the Workforce*, 107th Cong., 2d Sess. 14 (2002) (statement of William B. DeLauder, President of Delaware State University). Moreover, historically black college and university graduates represent 85 percent of all African American physicians, 80 percent of all African American federal judges, 75 percent of African American Ph.D.s, 50 percent of all African American engineers, and 46 percent of all African American business executives. 146 Cong. Rec. H7845 (daily ed. Sept. 19, 2000) (statement of Rep. Cummings).[3]

The degree of success that African Americans have enjoyed in higher education could not have been achieved, however, without many other factors, including rulings by this Court ordering an end to racial segregation, the improvement of primary and secondary education for African Americans, and most important, the efforts by other institutions of higher education. Indeed, UNCF and its member colleges and universities do not have the

[3] In 2001, UNCF member Xavier University of Louisiana sent 94 African American graduates on to medical school, more than any other American college for the ninth year in a row. Three other historically black colleges and universities were among the ten schools that graduated the most African Americans who successfully applied to medical schools that year: Spelman College (38), Morehouse College (33), and Howard University (33). The traditionally white institutions in that top ten group each graduated less than half as many as Xavier: Harvard (37), the University of Maryland (24), Johns Hopkins University (20), the University of California Los Angeles (17), the University of North Carolina at Chapel Hill (16), and the University of Virginia (16). *Xavier Remains at Head of Class*, Times-Picayune, Jan. 16, 2002, at M1.

financial or other resources to provide higher education opportunities to all qualified African American students, nor should they be expected to do so. UNCF believes that, for the American ideals of educational access and economic progress to be achieved, African American students must be ensured access to the full spectrum of educational opportunities.

Before enactment of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, the vast majority of African Americans who were enrolled in college attended historically black colleges and universities. By 1996, that number had decreased to approximately 25 percent because traditionally white institutions were educating nearly 75 percent of the African Americans in college. Frederick D. Patterson Research Institute/UNCF, *Two Decades of Progress: African Americans Moving Forward in Higher Education* 20-21 tbl. 7 (1999). That shift has resulted in an increased range of higher education choices for African American students. These students have profited from being able to select among a diverse array of institutions of higher education. *Cf. United States v. Fordice*, 505 U.S. 717, 748-749 (1992) (Thomas, J., concurring). Each college and university has a unique set of intangible qualities "which are incapable of objective measurement," but which define the value of the education apart from the curriculum. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). "Such qualities, to name but a few, include * * * position and influence of alumni, standing in the community, traditions and prestige." *Ibid.*

As this Court has recognized, an individual derives unique advantages from attending a school from which are drawn those who will hold "the most distinguished positions" in public and private life. *Id.* at 633; *United States v. Virginia*, 518 U.S. at 552-554. Graduates of UNCF colleges and universities have a particular interest in attending

the most selective graduate and professional schools because of their broader range of program offerings.[4]

2. Efforts by traditionally white institutions to increase racial diversity on campuses have contributed to the increased representation of African Americans in higher education

One of the important factors contributing to the dramatic increase in African American representation in higher education over the past 30 years is the concerted effort by traditionally white institutions to increase African American enrollment on their campuses. Beginning in the early 1960s, in the midst of the growing civil rights movement and this country's increased attention to the discrimination suffered by African Americans, many such institutions committed themselves to identifying and enrolling qualified African American students. They recognized that the lack of racial diversity on their campuses was, in significant part, a consequence of the Nation's history of racial segregation and discrimination in education. *Regents of the Univ. of California v. Bakke*, No. 76-811, Brief of Columbia University, Harvard University,

[4] The examples of UNCF graduates who have gone on to pursue advanced degrees at the most selective institutions are many, including renowned national leaders such as Deborah Hyde, M.D. (one of only four African American female neurosurgeons in the country) (B.S. Tougaloo College, M.S. Cleveland State University, M.D. Case Western Reserve Medical School); Donald Hopkins, M.D. (1995 recipient of MacArthur "Genius" Fellowship) (B.S. Morehouse College, M.D. University of Chicago, M.P.H. Harvard University); Ruth Simmons (President of Brown University) (B.A. Dillard University, M.A. and Ph.D. Harvard University); Walter E. Massey (physicist; former Director of the National Science Foundation) (B.S. Morehouse College, M.S. and Ph.D. Washington University in St. Louis); John Hope Franklin (historian; 1995 recipient of the Presidential Medal of Freedom) (A.B. Fisk University, A.M. and Ph.D. Harvard University); and Marian Wright Edelman (attorney; 2000 recipient of the Presidential Medal of Freedom) (B.S. Spelman College, LL.B.Yale Law School).

Stanford University, and University of Pennsylvania as *Amici Curiae* 30, 17 n.7.

The effort to build a diverse student body served a dual function – it provided African American students "with the same opportunities and education as their white peers," while also benefiting "majority as well as minority students" because of the diverse backgrounds and perspectives that were brought together for classroom debate. Elizabeth A. Duffy & Idana Goldberg, *Crafting A Class: College Admissions and Financial Aid, 1955-1994* 141 (1998). Creating an academic environment in which students of different races may exchange ideas also helped to dispel stereotypical views of minority groups.

Colleges, universities, and professional schools also learned that admitting students who did not perform as well on traditional tests or grading systems did not lead to a significantly different rate of graduation. They found that the success rate of African Americans whom they admitted at such institutions did not differ substantially from their peers. *See Shape of the River*, *supra*, at xxxi-xxxii, 60-61, 110-111, 138-140. That success reflects the care that the institutions have taken in making admissions decisions that reaffirm that considerations of non-quantitative factors such as the applicant's contributions to school and society, and his or her family circumstances, among others, are useful predictors of likely success in academia and beyond. *Ibid*; Richard O. Lempert *et al.*, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 Law & Social Inquiry 395, 496 (2000).

The recruitment efforts of traditionally white institutions of higher education since the 1960s have succeeded in significantly increasing African American access to both undergraduate and professional schools. "From 1960 to 1995, the percentage of blacks aged 25 to 29 who had graduated from college rose from 5.4 to 15.4 percent." *Shape of the River*, *supra*, at 9-10. The percentage of African Americans in law school "grew from barely 1 percent in 1960 to 7.5 percent by 1995." *Id.* at 10. And the

percentage of medical students who were African American "climbed from 2.2 percent in 1964 to 8.1 percent in 1995." *Ibid.*

3. Use of race-conscious admission criteria and other non-quantitative factors to supplement traditional quantitative measures of college preparedness has assisted many colleges and universities in identifying qualified African American students

Many of the efforts by traditionally white institutions to increase the enrollment of African Americans have included race-conscious policies. *Amici* believe that such efforts continue to be a necessary component of any successful strategy to maintain a significant enrollment of African Americans in higher education.

Because race and income play such a decisive role in how students are educated in the primary and secondary grades, as well as whether they will gain admission to college, it is inconceivable that the Nation would assume that the mere unlocking of the door to college for minority students would permit their unfettered entry. Moreover, the continued use of arbitrary cut-off scores on standardized tests, such as the Scholastic Aptitude Test (SAT) and the American College Testing Assessment (ACT), along with grade point averages to determine admission extends the racially discriminatory effects of income and inferior schooling to the higher education admissions process. It is undisputed that the efforts over the past 30 years to increase African American representation in colleges, universities, and professional schools, could not have succeeded absent the application of selection criteria that extended beyond a strict comparison of grade point averages and scores on standardized tests. Historically, the grades and standardized test scores of African Americans have on average been lower than those of whites. Although that gap has narrowed over the last 30 years, it remains significant today. The reasons for the current disparities are varied and complex, but ultimately rooted in the

history of systemic discrimination against African Americans:

> [T]est-score gaps remain. . . . That is hardly surprising, given the deep-seated nature of the factors that impede academic opportunity and achievement among minority groups – including the fact that a very large proportion of such students continue to attend primary and secondary schools that are underfinanced, insufficiently challenging, and often segregated. It would be naive to expect that a problem as long in the making as the racial divide in educational preparation could be eradicated in a generation or two.

William G. Bowen & Neil L. Rudenstine, *Race-Sensitive Admissions: Back to Basics*, Chron. of Higher Educ., Feb. 7, 2003, at B7.

The effects of past discrimination against African Americans are felt today in a variety of ways including not only through attendance at substandard primary and secondary schools, but also through factors such as having parents who did not have an opportunity to attend college themselves. Those less tangible factors also contribute to a child, regardless of ability, being less likely to perform well on tests. Indeed, a recent comprehensive study of the preparedness gap between African Americans and whites and relative differences in academic performance has concluded that such differences can be attributed largely to the persistent educational and socioeconomic disadvantages suffered by African Americans. Douglas S. Massey *et al.*, *The Source of the River: The Social Origins of Freshmen at America's Selective Colleges and Universities* 166, 205-206 (2003).

Significantly, however, a determination that there is a lack of preparedness under traditional evaluation criteria does not mean that African Americans who are identified through other means are not qualified and do not thrive at colleges and universities once admitted. *See* page 21, *supra*. The use by traditionally white institutions of additional admission criteria has helped to identify qualified African Americans who perform well in college and

graduate school and in the "real world." *Amici* are particularly aware of such success with regard to their own alumni who gained the academic skills through four years of undergraduate education to qualify for admission at the most selective graduate and professional schools. *See* note 4, *supra*. Historically black colleges and universities have always devoted significant attention and resources toward ensuring that all of their students are afforded the support and appropriate environment to overcome poor secondary school preparation, as is necessary for them to succeed at the college level and beyond. *Stand and Prosper*, *supra*, at 235-236; Jacqueline Fleming, *Blacks In College* 8-10 (1984). For example, since 1990, more than 150 students at Xavier University of Louisiana (an approximate average of 10 per year) with SAT scores near or below the national average performed especially well in college course work and, following graduation, went on to earn medical degrees from institutions such as the University of Pennsylvania, Emory University, New York University, and the University of Michigan. Other Xavier graduates with similar SAT scores have obtained doctoral degrees from the Massachusetts Institute of Technology and Princeton University, and law degrees from Columbia University and Tulane University.[5]

[5] Other private historically black colleges and universities and formerly segregated public land-grant institutions have prepared African American students who have gone on to achieve outstanding academic success at the graduate level, to enjoy prominent careers, and to provide superior public service. The late Ronald E. McNair, a NASA astronaut and crew member on the space shuttle Challenger, is a classic example of that phenomenon. McNair graduated from North Carolina Agricultural & Technical State University and then went on to obtain a Ph.D. in physics from the Massachusetts Institute of Technology.

C. Colleges, Universities, And Professional Schools Must Continue To Be Able To Consider Race In Admissions And Financial Aid In Order To Maintain Access By African Americans

As demonstrated above, the history and continued denial of educational opportunities for African Americans in this country, rooted in slavery and antebellum laws, the subsequent disparate financing of racially segregated public education, and the continued underfunding of many schools in minority communities, have resulted in a financial gap for many African Americans, as well as a college preparedness gap for some, that persists to this day. Consequently, African Americans continue to have lower participation rates at institutions of higher education. That pattern is most evident in graduate and professional schools. In 1996, African Americans received only 6.4 percent of professional degrees, 6.0 percent of Master's degrees and 3.5 percent of doctoral degrees awarded throughout the country. *Two Decades of Progress*, *supra*, at 61 fig. 24, 69 fig. 26, 76.

1. Colleges, universities, and professional schools should be free to use a variety of strategies with regard to admissions and financial aid in order to assemble diverse student bodies that best advance their varied educational missions

a. Educational institutions must have the flexibility to use strategies other than traditional quantitative means of evaluating preparedness and likelihood of success in order to maintain racial diversity on their campuses. The only alternative that has consistently proven effective is one that incorporates some measure of race-consciousness into its admission criteria. Although many race-neutral alternatives have been suggested – and some implemented – none of them have yet proven effective, and all suffer from serious limitations. Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*

(2003); Marta Tienda *et al.*, *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* (2003).

For example, the "percentage plans" adopted in states like Texas rely upon an arbitrary and mechanical admissions factor – a student's rank in a high school – that leaves no room for consideration of other applicant qualifications or the relative academic strengths of high schools. Moreover, to the extent such plans are effective in achieving racial diversity in colleges, it is only because of *de facto* racial segregation in the high schools. In any event, such a plan is not an option for private colleges or universities or for graduate and professional schools, whether public or private, that draw from a national and international applicant pool.

In a recent defense of race-conscious admissions policies, William G. Bowen, the president emeritus of Princeton University, and Neil Rudenstine, the president emeritus of Harvard University, discuss several purportedly "race-neutral" approaches, including percentage plans and plans focused on socioeconomic or geographic factors. They explain that all of the plans "pose serious problems" and cannot "be accurately described as 'race-neutral' ":

> They have all been conceived with the clear goal (whether practicable or not) of producing an appreciable representation of minority students in higher education. In some cases, they involve the conscious use of a kind of social engineering decried by critics of race-sensitive admissions.
>
> Surely the best way to achieve racial diversity is to acknowledge candidly that minority status is one among many factors that can be considered in an admissions process designed to judge individuals on a case-by-case basis. We can see no reason why a college or university should be compelled to experiment with – and "exhaust" – all suggested alternative approaches before it can turn to a carefully tailored race-sensitive policy that focuses on individual cases. The alternative approaches are susceptible to systematic analysis, based on experience and empirical investigation. A preponderance of them have been tested for decades. All can be shown to be seriously deficient. Indeed, if genuinely race-neutral (and educationally appropriate) methods were available, colleges and universities would long ago have gladly embraced them.

Race-Sensitive Admissions, *supra*, at B10.

b. Allowing the use of race-conscious policies in the awarding of financial aid is also critical to ensuring African Americans continued access to higher education. After all, the admission of qualified African Americans even under the most rigid, traditional quantitative standards means nothing if such students cannot afford to attend. Given that minorities disproportionately come from lower income families, they rely on federal, state, and institutional "need-based" aid to pay college costs. Moreover, colleges rely on such aid to help recruit and retain minority students. Even those forms of aid – packaged for needy students – leave significant funding "gaps" in meeting the cost of attendance. Advisory Committee on Student Financial Assistance, *Empty Promises: The Myth of College Access In America* 15-29, 34-37 (2002).

It is unclear how reversal of the court of appeals' ruling would affect the wide variety of financial aid programs in use today. Privately administered scholarships would not, of course, be subject to the same strictures as public funds. Nonetheless, a decrease in available public sources of aid would increase the demand for private aid. The limited pool of private financial aid certainly is inadequate to meet such an increase in demand. The current imbalance in grant aid versus loan aid could be exacerbated if minority scholarships were determined to be impermissible – resulting in a reduction in the availability of such scholarships to minority college students. General Accounting Office, *Information on Minority-Targeted Scholarships* 1-4 (Jan. 1994).

2. In order to ensure the presence of African Americans in critical professions and positions of leadership in American society, institutions of higher education must include students of diverse racial backgrounds

For most Americans, education is a means of achieving economic and social success. Thus, the under representation of African Americans in higher education means that proportionately fewer African Americans have access to society's more influential and lucrative occupations. Such occupations represent "powerful engines of social mobility," and in many ways hold the key to the emergence of a substantial and permanent African American middle class. *Shape of the River*, *supra*, at 10-14, 94-96, 118-154; *see Plyler v. Doe*, 457 U.S. 202, 222 (1982).

Between 1960 and 1990, for example, the number of African American physicians in the country almost doubled and the number of African American attorneys and engineers nearly tripled. *Shape of the River*, *supra*, at 10. The percentage of managers or professionals among African Americans has increased from 5 percent in 1950 to 20 percent in 1990. *Ibid.* The proportion of African Americans who earned more than $50,000 per year rose from 5.8 percent in 1967 to 13 percent in 1992. *Id.* at 10-11. Despite these gains, the African American middle class remains much smaller proportionately than the white middle class, with African Americans less than half as likely as whites to earn $50,000 per year. *Id.* at 11. Continued improvement will depend upon continued access to higher education.

According to a recent statistical analysis of medical school admissions and enrollment in 1996, an admissions policy based strictly upon undergraduate grades and standardized test scores would have resulted in an 85 percent drop in African American acceptances at traditionally white medical schools, leading to a 2 percent population of underrepresented minorities at these schools. Herbert W. Nickens, Association of American Medical Colleges, *Questions and Answers on Affirmative Action in Medical Education* 7 (1998). Similarly, according to one estimate, if law school admissions had been based solely on numerical measures, 90 percent of the African Americans in the 1991 entering class would not have been admitted. Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race As a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1, 50-51 (1997). Yet African Americans who have been admitted to such schools in the past have graduated successfully and entered those professions. *E.g.*, *Michigan's Minority Graduates in Practice*, *supra*, at 395, 496.

As for the most selective undergraduate institutions, a statistical analysis of admissions data predicts that such institutions would suffer "drastic" decreases in African American enrollment if race were not considered, with enrollment at the most selective of these schools falling more than 70 percent. *Shape of the River*, *supra*, at 31-42. Those predictions are consistent with the over 50 percent drop in enrollment that the University of California, Berkeley, experienced in 1998, the first year following the University of California's state-wide abandonment of race-conscious admissions policies. *Percent Plans in College Admissions*, *supra*, at 49 tbl. 29.

Based on the studies of what would have happened if institutions of higher education had not, in the past, looked beyond "the numbers," there would be 40 percent fewer minority doctors today. *Questions and Answers*, *supra*, at 7. No doubt similar reductions would have occurred in other professions. That waste of human potential would be detrimental not only to individual African American students, but to the Nation as a whole.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Sixth Circuit in *Grutter v. Bollinger*, No. 02-241, and the judgment of the District Court for the Eastern District of Michigan in *Gratz v. Bollinger*, No. 02-516, should be affirmed.

Respectfully submitted,

SYDNEY M. AVENT
General Counsel

WILLIAM A. BLAKEY
DEAN BLAKEY
Washington Counsel

UNITED NEGRO COLLEGE FUND
8260 Willow Oaks
Corporate Drive
Fairfax Virginia 22031

DREW S. DAYS, III
Counsel of Record

JONATHAN BAND
BETH S. BRINKMANN
SETH M. GALANTER
CHARLES C. CARSON
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1500

Attorneys for Amici Curiae

FEBRUARY 2003

United Negro College Fund
Member Colleges and Universities

Barber-Scotia College (est. 1867), Concord, NC

Benedict College (1870), Columbia, SC

Bennett College (1873), Greensboro, NC

Bethune-Cookman College (1904), Daytona Beach, FL

Claflin University (1869), Orangeburg, SC

Clark Atlanta University (1865), Atlanta, GA

Dillard University (1869), New Orleans, LA

Edward Waters College (1866), Jacksonville, FL

Fisk University (1866), Nashville, TN

Florida Memorial College (1879), Miami, FL

Huston-Tillotson College (1876), Austin, TX

Interdenominational Theological Center (1867), Atlanta, GA

Jarvis Christian College (1912), Hawkins, TX

Johnson C. Smith University (1867), Charlotte, NC

Lane College (1882), Jackson, TN

LeMoyne-Owen College (1862), Memphis, TN

Livingstone College (1879), Salisbury, NC

Miles College (1905), Birmingham, AL

Morehouse College (1867), Atlanta, GA

Morris College (1908), Sumter, SC

Morris Brown College (1885), Atlanta, GA

Oakwood College (1896), Huntsville, AL

Paine College (1882), Augusta, GA

Paul Quinn College (1872), Dallas, TX
Philander Smith College (1877), Little Rock, AR
Rust College (1866), Holly Springs, MS
Saint Augustine's College (1867), Raleigh, NC
Saint Paul's College (1888), Lawrenceville, VA
Shaw University (1865), Raleigh, NC
Spelman College (1881), Atlanta, GA
Stillman College (1876), Tuscaloosa, AL
Talladega College (1867), Talladega, AL
Tougaloo College (1871), Tougaloo, MS
Tuskegee University (1881), Tuskegee, AL
Virginia Union University (1865), Richmond, VA
Voorhees College (1897), Denmark, SC
Wilberforce University (1856), Wilberforce, OH
Wiley College (1873), Marshall, TX
Xavier University (1915), New Orleans, LA